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PRE-TRIAL CHAMBER

Before: **Judge Maria del Socorro Flores Liera, President of the Pre-Trial Division**

Pre-Trial Chamber to be assigned to the situation in Nigeria

SITUATION IN NIGERIA

Public Document

VICTIMS' REQUEST FOR CLARIFICATION AND AN ORDER TO COMPEL THE PROSECUTOR TO ACT ON THEIR LEGAL OBLIGATIONS UNDER ARTICLE 15(3)

Source: **Amnesty International**

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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Counsel for the Defence

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparations)

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I. INTRODUCTION

1. This request is made by Amnesty International in representation of victims of war crimes and crimes against humanity in northeast Nigeria who are members of the Jire Dole Networks ("the Applicants"). [1]

2. Jire Dole networks is a group constituted of eleven different social networks of individuals who have suffered various human rights violations or abuses by the armed group Boko Haram or the Nigerian state in northeast Nigeria. It is led by a group of human rights activists, journalists and relatives of victims and survivors based in Maiduguri, set up in April 2017. They organise a loose network of victims, survivors and relatives through the setting up of groups and structures in Maiduguri and various IDP camps in Borno state. This submission is filed on behalf of the following networks, which are part of Jire Dole Networks: the Knifar Movement, composed of over 5,720 displaced women who were separated from their husbands since their husbands were arrested; the Returning Knifar Husbands network, composed of over 2,840 men who returned from the Safe Corridor and Giwa Barracks-Military Joint Investigation detention centers; the Jire Dole Mothers, composed of over 5,800 relatives of arrested and disappeared young men; the Njotkuno Movement, composed of over 6,650 women, men and children formerly detained by the Nigerian military; and the IndaRai network, composed of over 2,365 survivors of abductions and sexual violence and mothers of the 'invisible children' who were conceived and born while their mothers were in Boko Haram captivity or in detention facilities. Members of these seven networks alone total 23,382 individuals as of January 2024.

3. Amnesty International is an international non-governmental organisation. It is a movement of ten million people which mobilizes the humanity in everyone and campaigns for change so we can all enjoy our human rights. Its vision is of a world where those in power keep their promises, respect international law and are held to account. Amnesty International is independent of any government, political ideology, economic interest or religion and is funded mainly by its membership and individual donations. Amnesty International has worked in close collaboration with, and in support of, Jire Dole networks

[1] These submissions have been drafted with the legal support of UpRights.

for over a decade, including to document crimes committed within the armed conflict in northeast Nigeria and to advocate and campaign for justice at the national and international levels. Amnesty International has also shared its documentation of relevance to the Nigeria situation with the Office of the Prosecutor to support its preliminary examination.

4. The present submission is being filed on behalf of members of the above-mentioned networks who are direct and indirect victims of murder, enforced disappearances, abductions, conscription and use of child soldiers, enslavement, forced marriage, sexual slavery, rape and other sexual violence, mutilation, imprisonment, torture and other ill-treatment, and other crimes committed in the context of the conflict in northeast Nigeria since 2011, constituting war crimes and/or crimes against humanity.

5. The Office of the Prosecutor (OTP) of the International Criminal Court (ICC) opened a preliminary examination into the situation in Nigeria in 2010, then closed it in 2020, concluding that the criteria were met for the opening of an investigation. Four years later, the OTP is yet to request the authorization to open such investigation and to provide an explanation with regards to the delay.

6. The applicants are of the view that, under Article 15(3) of the Rome Statute, the Prosecutor has a legal obligation to request authorization from the Pre-Trial Chamber to open an investigation if they conclude that there is a reasonable basis to proceed with an investigation. Having made that conclusion in relation to the situation in Nigeria, the Prosecutor was and still is under a legal obligation to request authorization from the Pre-Trial Chamber to proceed with an investigation, without further delay. This legal obligation is also consistent with internationally recognized human rights, including the rights of victims to truth, justice and reparations, and to being informed about the status and progress of criminal proceedings.

7. The Applicants respectfully request the Pre-Trial Chamber to find that, in failing to request authorisation to open an investigation into the situation in Nigeria, the Prosecutor is acting inconsistently with their obligation under article 15(3) of the Statute, and to take any appropriate measures to remedy the situation.

II. BACKGROUND

Situation of Nigeria before the International Criminal Court (ICC)

8. The situation in Nigeria was subject to preliminary examination by the Office of the Prosecutor (OTP) for 10 years, between 18 November 2010 and 11 December 2020.[2] The preliminary examination focused on alleged war crimes and crimes against humanity committed in the context of the armed conflict between Boko Haram and the Nigerian Security Forces.[3]

9. On 11 December 2020, the Prosecutor announced the completion of the preliminary examination of Nigeria with the determination that the statutory criteria to proceed with an investigation had been met. They stated:

> "Today, I announce the conclusion of the preliminary examination of the situation in Nigeria. […] *Following a thorough process, I can announce today that the statutory criteria for opening an investigation into the situation in Nigeria have been met.* […]
>
> The duration of the preliminary examination, open since 2010, was due to the priority given by my Office in supporting the Nigerian authorities in investigating and prosecuting these crimes domestically. […] I have given ample time for these proceedings to progress, bearing in mind the overarching requirements of partnership and vigilance that must guide our approach to complementarity. However, our assessment is that none of these proceedings relate, even indirectly, to the forms of conduct or categories of persons that would likely form the focus of my investigations. And while this does not foreclose the possibility for the authorities to conduct relevant and genuine proceedings, it does mean that, as things stand, the requirements under the Statute are met for my Office to proceed. *Moving forward, the next step will be to request authorisation from the Judges of the Pre-Trial Chamber of the Court to open investigations.* […]" (emphasis added).[4]

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[2] OTP, Report on Preliminary Examination Activities 2020, 14 December 2020, para 248 [hereinafter referred to as "Report on Preliminary Examination Activities 2020"]; Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria, 11 December 2020. [hereinafter referred to as "Prosecutor Statement 11 December 2020"]

[3] Report on Preliminary Examination Activities 2020, paras. 253-257.

[4] Prosecutor Statement 11 December 2020.

10. The Prosecutor's 2020 annual report on preliminary examinations also explained the closure of the preliminary examination into the situation in Nigeria and the next steps, in those terms:

> "The Office has concluded its preliminary examination of the situation in Nigeria with a determination that the criteria to proceed with an investigation are met with respect to subject-matter, admissibility, and the interests of justice.
>
> For the next steps, in the light of the operational capacity of the Office […], the Prosecutor intends to consult with the incoming new Prosecutor, once elected, on the strategic and operational issues related to the prioritisation of the Office's workload and the filing of necessary applications before the Pre-Trial Chamber."[5]

11. Despite the Prosecutor indicating that the next step was to request authorisation from the Pre-trial Chamber to open an investigation, the Prosecutor did not take this step. Instead, over 16 months later, in April 2022, the Prosecutor visited Abuja, Nigeria to meet with the authorities. Upon completing this visit, the Prosecutor published a statement stating that:

> "[…] Impunity cannot be an option, and my Office will continue to fulfil its statutory obligations in relation to the situation in Nigeria, in cooperation with relevant national authorities. This visit was driven by the need to continue my Office's engagement with the Nigerian authorities and clarify the status of the situation in Nigeria following the conclusion of its preliminary examination by my predecessor in December 2020. […]
>
> In these discussions [with Nigerian authorities], I recalled that the legal criteria to open an investigation into the situation in Nigeria were met in relation to allegations of crimes committed in the course of the non-international armed conflict between the Nigerian security forces and Boko Haram. We were in agreement that the principle of complementarity enshrined in the Rome Statute required such crimes to be addressed through domestic proceedings, or failing that, by my Office. […] During my visit I have furthermore shared with the Nigerian authorities my vision on the role regional organisations such as ECOWAS and the African Union could play in the global

[5] Report on Preliminary Examination Activities 2020, para 265.

fight against impunity for serious international crimes in partnership with my Office. […]

I will therefore continue to look for ways and means to engage in dialogue to promote complementarity, whether at the current threshold where we stand or in the context of an opened situation. We have furthermore agreed with Nigerian authorities on the next immediate steps to inform any future decision I will be making on the situation. I have proposed clear timelines in this respect […]. After over a decade of communications and exchanges between my Office and Nigerian authorities we need to now move with urgency to deliver on our joint commitments to justice and translate these into concrete actions." [6]

12. There was seemingly no activity by the OTP on the situation in Nigeria between April 2022 and March 2024.

13. In March 2024, the Deputy Prosecutor visited Abuja, Nigeria. The OTP published the following statement upon the completion of the visit:

"This visit, which aimed to deepen the Office's engagement and dialogue with the Nigerian authorities since the conclusion of the preliminary examination in the situation in Nigeria in 2020, provided Deputy Prosecutor Niang an opportunity to hold constructive meetings […].

Deputy Prosecutor Niang stated 'I'm grateful to the Nigerian authorities for the frank and open dialogue […]. I welcome the expression of willingness and ability by the Nigerian authorities to take their full responsibility as regards the alleged criminal conduct the Office has identified. […] [W]e will continue to monitor any progress regarding national proceedings and we will seek to give a chance to the principle of complementarity in Nigeria. […]'

He noted that the Office, while giving a chance to the principle of complementarity in Nigeria, remains committed to move forward with investigations in the absence of genuine efforts by Nigerian authorities." [7]

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[6] ICC Prosecutor, Mr Karim A.A. Khan QC, concludes first official visit to Nigeria, 22 April 2022. (hereinafter referred to as "Prosecutor Statement April 2022")

[7] Statement of the ICC Office of the Prosecutor at the conclusion of Deputy Prosecutor Mame Mandiaye Niang's official visit to Abuja, Nigeria, 27 March 2024.

14. To date, 2 December 2024, the Prosecutor has not yet requested authorisation from the Pre-Trial Chamber to open an investigation into the situation in Nigeria. The OTP has also never visited northeast Nigeria to meet directly with the affected communities.

Communications between the Applicants, their representatives and the OTP

15. For over a decade, Amnesty International has submitted a substantial amount of information to the OTP relevant to the preliminary examination of the situation in Nigeria, on the basis of article 15(2). An integral aspect of these submissions is the first-hand information from victims and victim networks in the northeast of Nigeria, such as Jire Dole networks.

16. In 2015, Amnesty International shared the findings of its research and relevant evidence, including official documents and videos with the Office of the Prosecutor. The organization has also, in 2015, submitted to the Office of the Prosecutor a list of names of military officers who should be investigated for their possible role in the crimes under international law and serious human rights violations documented in its reports.[8]

17. Public reports by Amnesty International[9] have been formally transmitted to the Prosecutor or otherwise brought to their attention.

18. The information submitted in both the confidential submission and from the public reports related to crimes committed against the civilian population in the context of the armed conflict in northeast Nigeria, the harm suffered by the victims of these crimes, alleged responsibilities among the armed group Boko Haram and the Nigerian military, as well as information about efforts at the national level to investigate and prosecute these crimes, or

[8] Stars on their shoulders. Blood on their hands. War crimes committed by the Nigerian military, June 2015, AFR 44/1657/2015, page 16

[9] These reports by Amnesty International include, but are not limited to: 'Help us build our lives', Girls survivors of Boko Haram and Military Abuses in Northeast Nigeria, June 2024, AFR 44/7883/2024; 'My heart is in pain' Older people's experience of conflict, displacement, and detention in northeast Nigeria, December 2020, AFR 44/3376/2020; 'We dried our tears' Addressing the toll on children of Northeast Nigeria's conflict, May 2020, AFR 44/2322/2020; Willingly Unable, ICC preliminary examination and Nigeria's failure to address impunity for international crimes, December 2018, AFR 44/9481/2018; 'They betrayed us' Women who survived Boko Haram raped, starved and detained in Nigeria, May 2018, AFR 44/8415/2018; 'If you see it, you will cry' Life and death in Giwa barracks, May 2016, AFR 44/3998/2016; Stars on their shoulders. Blood on their hands. War crimes committed by the Nigerian military, June 2015, AFR 44/1657/2015; 'Our job is to shoot, slaughter and kill' Boko Haram's reign of terror in north-east Nigeria, April 2015, AFR 44/1360/2015

the lack thereof. Early reports on preliminary examinations by the OTP show that the Prosecutor relied on information reported by Amnesty International.[10]

19. The leaders of the Knifar movement, one of the Jire Dole groups, presented their views with the OTP in Abuja in 2017, including discussions on family members directly affected by crimes under international law as being held in Giwa Barracks or being disappeared since their arrest. One of the women leaders has since died.

20. On 17 December 2020, just a few days after the Prosecutor announced the closure of the preliminary examination, Amnesty International held a public event live-streamed on several social media platforms,[11] in which panellists invited to exchange included a representative from the OTP, a representative from the Jire Dole networks as well as a representative from Amnesty International. During this event, the representative of the OTP confirmed that the Prosecutor had concluded their assessment and that the OTP "stands ready to carry out an investigation".[12]

21. In the years following the closure of the preliminary examination, Amnesty International attempted to obtain clarity from the OTP about the status of the Nigeria situation before the ICC, the reasons for this status, and the ongoing and planned action by the Prosecutor. This was done through direct correspondence addressed to the OTP and in parallel, Amnesty International continued to publicly call on the Prosecutor to request authorisation to open an investigation into the situation in Nigeria without further delay.

a. On 13 February 2021 Amnesty International addressed an open letter to the OTP requesting immediate action on the situation in Nigeria.[13]

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[10] OTP, Situation in Nigeria, Article 5 report, August 2013, paras. 23 and 103; OTP, Report on preliminary examination activities (2015), November 2015, paras. 199-202 and 211-213; OTP, Report on preliminary examination activities (2017), December 2017, para. 211. Note that subsequent reports did not include information on sources used by the OTP anymore.

[11] Live-streaming event titled 'Accountability in Nigeria: time for action', organized by Amnesty International, 17 December 2020.

[12] Live-streaming event titled 'Accountability in Nigeria: time for action', organized by Amnesty International, 17 December 2020, Minute 46 : "The prosecutor has given a lot of time and effort to help to encourage the national response but ultimately we concluded […] our assessment this year. Now we have indeed confirmed that as things stand, there is a basis for the court to proceed. […] We stand ready to carry out our own investigation."

[13] Open Letter to the OTP requesting immediate action on the situation in Nigeria, 13 February 2021, AFR 44/3654/2021.

b. On 16 June 2021, Amnesty International's Secretary General addressed an open letter to the OTP on the situation in Nigeria.[14]

c. On 28 April 2022, Amnesty International sent a letter to the Prosecutor to request information,[15] to which the OTP answered via a brief email dated 13 May 2022,[16] providing no more information than what had been included in the statement[17] the Prosecutor had released the previous month.

d. On 5 December 2022, Amnesty International published a public statement containing its four calls to the ICC Prosecutor on the situation in Nigeria.[18]

e. On 4 December 2023, Amnesty International published an illustrated statement titled 'Nigeria: Time for Justice is Now' including its renewed three calls to the ICC Prosecutor.[19]

f. On 27 February 2024, Amnesty International sent another letter to the Prosecutor to enquire about the status of the ICC situation in Nigeria.[20] The Deputy Prosecutor replied by letter on 7 May 2024,[21] but did not provide any answers to the questions posed by the Applicant.

III. ARGUMENTS

a) The Prosecutor has a legal obligation to request authorisation from the Pre-Trial Chamber to open an investigation if they conclude that there is a reasonable basis to proceed with an investigation.

22. Under article 15 of the Rome Statute, the Prosecutor may initiate an investigation *proprio motu* on the basis of information about a crime within the jurisdiction of the Court. On the basis of their analysis of the information received, article 15(3) provides that: "If the

[14] Open Letter from Amnesty International Secretary General Agnès Callamard to ICC Prosecutor, 16 June 2021; Amnesty International,
[15] Confidential annex 1.
[16] On File with Amnesty International.
[17] See para 11 of the present submission
[18] Amnesty International, Nigeria: Four Calls to the ICC Prosecutor, 5 December 2022, AFR 44/6264/2022
[19] Amnesty International, Nigeria, The Time for Justice is Now, 4 December 2023, AFR 44/7481/2023
[20] Confidential annex 2.
[21] Confidential annex 3.

Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation together with any supporting material collected."

23. If the Prosecutor concludes, based on the statutory criteria contained in article 53(1), that there is a reasonable basis to open an investigation, article 15(3) imposes an obligation on them to request authorisation from the Pre-Trial Chamber to open an investigation. The language of article 15(3) is unambiguous in this respect: the use of the word 'shall' makes clear that the Prosecutor has a legal duty to submit to the Pre-Trial Chamber a request for authorisation of an investigation if they conclude that there is a reasonable basis to proceed with an investigation.

24. The verb 'shall' is defined in the Oxford English Dictionary as "expressing a strong assertion or intention" or "expressing an instruction, command, or obligation" when used in an affirmative sentence. As used in article 15(3), the verb shall demonstrates an obligation.

25. This interpretation of the meaning of 'shall' is confirmed by the Appeals Chamber, in its analysis of article 53. The Appeals Chamber stated that: "If a situation is referred by a State Party or the Security Council, article 53(1) of the Statute places, in principle, *an obligation on the Prosecutor* to open an investigation, by providing that '[t]he Prosecutor *shall* [...] initiate an investigation unless […]'"[22] (first emphasis added). This confirms that the word 'shall' indicates a required, as opposed to a discretionary, action.

26. The Pre-Trial Chamber has further confirmed that the use of the word 'shall' in article 15(3) indicates an analogous obligation to that of article 53(1) with respect to the consequences of a conclusion that there is a reasonable basis to proceed with an investigation. The Pre-Trial Chamber has stated that

> "If the Prosecutor reaches a positive determination according to the "reasonable basis" standard under articles 15(3) and 53(1) of the Statute, she *"shall submit"* to the Chamber a request for authorization of the investigation. As held by this Chamber in a previous composition, 'the presumption of article 53(1) of the Statute, as reflected

[22] AC, Judgment on the appeal against the decision on the authorisation of an investigation into the situation in the Islamic Republic of Afghanistan, *Situation in the Islamic Republic of Afghanistan,* 5 March 2020, ICC-02/17-138, para 28-29. (hereinafter referred as "2020 AC Judgment against the PTC decision not to authorize an investigation in Afghanistan")

by the use of the word 'shall' in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts'."[23] (emphasis in the original).

27. In its previous composition, the Pre-Trial Chamber further noted that "If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor *shall* open an investigation, *as only by investigating could doubts be overcome*."[24] (emphasis added).

28. The OTP has itself confirmed the legal duty contained in article 15(3) in its Policy Paper on Preliminary Examinations, noting that "[i]f the Office is satisfied that all the criteria established by the Statute for this purpose [of determining whether there is a reasonable basis to proceed with an investigation] are fulfilled, it has a legal duty to open an investigation into the situation."[25]

29. The Applicants are not suggesting that the Prosecutor's *proprio motu* power to initiate investigations is not discretionary. The Appeals Chamber has stated that "it would be contrary to the very concept [of the discretionary nature of the Prosecutor's power under article 15 of the Statute] to suggest that a duty to investigate could be imposed by the pre-trial chamber in the absence of a request for authorization of an investigation by the Prosecutor."[26] However, this statement applies to the discretionary nature of the language of 'may' contained in article 15, paragraph 1, which must be distinguished from the obligation imposed on the Prosecutor through the use of 'shall' in article 15(3).

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[23] Pre-Trial Chamber I, Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, 6 September 2018, ICC-RoC46(3)-01/18, para. 84. (hereinafter referred as "2018 PTC Judgment on a request for a ruling on jurisdiction in Myanmar/Bangladesh") See also Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, *Situation in the Republic of Kenya*, 31 March 2010, ICC-01/09-19-Corr, para. 20. (hereinafter referred to as "PTC 2015 Decision on authorisation of an investigation in Kenya"); Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, 16 July 2015, ICC-01/13, para. 13. (hereinafter referred to as "PTC 2015 Decision on Comoros request to review the decision not to initiate an investigation")

[24] PTC 2015 Decision on Comoros request to review the decision not to initiate an investigation, para. 13.

[25] OTP, Policy Paper on Preliminary Examinations, November 2013, para 2. According to the ICC's website, this policy paper is currently undergoing review - https://www.icc-cpi.int/about/otp/otp-policies.

[26] 2020 AC Judgment against the PTC decision not to authorize an investigation in Afghanistan, para 31.

30. The Pre-Trial Chamber indeed has no power to impose on the Prosecutor the conclusion that the statutory criteria for opening an investigation have been met. However, at the point at which the Prosecutor has concluded that these criteria have been met, the duty to request authorisation to open an investigation derives directly from the Statute. In other words, the Statute makes clear that, while article 15(1) provides the Prosecutor with discretion to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court, at the point at which the Prosecutor has concluded that there is a reasonable basis to proceed with an investigation, the Prosecutor's power under article 15(3) is no longer discretionary. At this point, through the use of 'shall', article 15(3) makes clear that the Prosecutor is instead required to request authorisation to open an investigation.

31. This distinction between the discretionary nature of an action indicated by the word 'may' and the obligatory nature of an action indicated by the word 'shall' is also confirmed by the statutory framework governing State referrals. In this respect, article 14(1) provides that "A State Party *may* refer to the Prosecutor a situation" (emphasis added) while, as noted by the Appeals Chamber, article 53(1) imposes an obligation by providing that "The Prosecutor *shall* […] initiate an investigation." (emphasis added)

32. In addition, the structure of article 15 excludes the possibility of prosecutorial discretion with respect to the consequences of a conclusion that there is a reasonable basis to proceed with an investigation. Once a preliminary examination has been opened under article 15(1), article 15 provides for only two possible outcomes; a request for authorisation of an investigation (article 15(3)) or a conclusion that there is no reasonable basis for an investigation (article 15(6)). A reading of article 15 suggesting that, upon concluding that there is a reasonable basis to proceed with an investigation, the Prosecutor's request for authorisation to open an investigation is discretionary, would open a third outcome not regulated under article 15. For instance, on such a reading, if the Prosecutor were to exercise this discretion not to request authorisation to open an investigation despite concluding that the criteria for doing so were met, no obligation corresponding to that contained in article 15(6) to inform those who provided information to the preliminary examination would appear to apply.

33. According to the language and structure of article 15(3) of the Statute, the Prosecutor

therefore has a legal obligation to request authorisation from the Pre-Trial Chamber to open an investigation, once they conclude that there is a reasonable basis to proceed with an investigation.

b) Having concluded that there is a reasonable basis to proceed with an investigation into the situation in Nigeria, the Prosecutor was and still is under a legal obligation to request authorisation from the Pre-Trial Chamber to do so, without further delay.

34. The preliminary examination of the Situation in Nigeria was concluded in 2020 with the definitive determination that "the criteria to proceed with an investigation are met with respect to subject-matter, admissibility, and the interests of justice."[27] In line with this determination, on 11 December 2020, the Prosecutor announced the conclusion of the preliminary examination and stated that "[m]oving forward, the next step will be to request authorisation from the Judges of the Pre-Trial Chamber of the Court to open investigations."[28]

35. The public statement of 11 December 2020 and the OTP's 2020 report on preliminary examinations are how the Prosecutor informed the Court, victims and the general public of their determination that there is a reasonable basis to open an investigation. The statement fulfils the requirement of article 15(3) that the Prosecutor "concludes that there is a reasonable basis to proceed with an investigation". The language of the public statement, as well as of the 2020 report on preliminary examinations of the OTP, is crystal clear that the Prosecutor had made their conclusion.[29]

36. Having demonstrated that the Prosecutor had concluded that there is a reasonable basis to proceed with an investigation into the situation in Nigeria, the Applicants submit that, pursuant to the obligation contained in article 15(3), the Prosecutor should have requested authorisation to do so.

37. In addition, the Applicants submit that such authorisation should have been requested immediately after, or at a minimum, within a reasonable time after this conclusion. A plain reading of the Rome Statute and the Rules of Procedure and Evidence indicates that

[27] Report on Preliminary Examination Activities 2020, para 265.
[28] Prosecutor Statement 11 December 2020.
[29] See paras 9-10 of the present submission

the drafters intended for the Prosecutor's obligation under article 15(3) to entail a request for authorisation to open an investigation immediately after the Prosecutor's conclusion that a reasonable basis to proceed with an investigation exists, or at a minimum, within a reasonable time after this conclusion.

38. In other situations, the Prosecutor has proceeded swiftly to request authorisation to proceed with an investigation, after having concluded that there was a reasonable basis to do so. With the exception of situations where, due to security reasons, the request was filed before the intention of the Prosecutor to open an investigation was made public (Burundi and the Philippines), the Prosecutor has submitted their request on the same day as the public announcement of the conclusion that the criteria were met for the opening of an investigation (Georgia, Afghanistan and Myanmar/Bangladesh), or within 3 days (Kenya) or 7 days (Cote d'Ivoire) of such an announcement. The only exception to this practice took place in relation to the situation in Ukraine, where the Prosecutor announced their conclusion that they would proceed with a request to open an investigation on 11 December 2020, but did not immediately submit such a request to the Pre-Trial Chamber. Over one year and two months later, the Prosecutor nevertheless opened an investigation into the situation in Ukraine without the need for authorisation from the Pre-Trial Chamber, as several states referred the situation to the Prosecutor, putting an end to an already unreasonable delay.

39. The practice of promptly requesting authorisation is in line with the general principle of expeditiousness, described by the Appeals Chamber as "a recurrent theme in the Court's legal instruments"[30]. The Appeals Chamber has stated in this respect that expeditiousness is "an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial rights of the accused."[31] The Chamber went on to highlight the importance of expeditiousness in the context of investigating and prosecuting international crimes, noting that "[t]he need to act expeditiously must also be viewed in the context in which the Court operates. The crimes under the Court's jurisdiction are by their nature complex and their adjudication takes time.

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[30] Appeals Chamber, *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled "Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings", 12 July 2010, ICC-01/04-01/07 OA 10, para 43.
[31] Ibid, para 47.

It is vital for cases to be properly managed from the start to forestall unnecessary delays. Undoubtedly, delays in proceedings are inimical to the proper administration of justice. For instance, witnesses to the alleged crime may become unavailable, or may, with the passage of time, forget what transpired. Material evidence, both incriminatory and exculpatory, may disappear or may be rendered useless by exposure to the elements. In this case, both the prosecution and the accused may be prejudiced."[32] The Appeals Chamber further noted that "[a]n expeditious trial is beneficial to victims. It assures them of receiving justice and of going through the healing process quickly."[33]

40. The Pre-Trial Chamber has similarly stressed the importance of expeditiousness in particular with respect to the initiation of an investigation following preliminary examination, noting that "an investigation should in general be initiated without delay and be conducted efficiently in order for it to be effective, since "[w]ith the lapse of time, memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist, and thus the prospects that any effective investigation can be undertaken will increasingly diminish".[34] Even Trial Chambers at the Court have noted the profound impact and detrimental effect that the length of time between the occurrence of the crimes and the moment in which evidence is presented at trial can have on the reliability of evidence presented before a Chamber. In particular, with the passage of time, victims "who suffered trauma, may have had particular difficulty in providing a coherent, complete and logical account."[35]

41. Accordingly, under article 15(3), the Prosecutor was required to seek authorisation from the Pre-Trial Chamber to open an investigation into the situation in Nigeria from December 2020. The Prosecutor failed to do so then and has failed continuously since then, in violation of their legal duty.

42. Any change of circumstances that may have taken place since 11 December 2020, including eventual new proceedings at the national level, while being of potential relevance

[32] Ibid, para 45.
[33] Ibid, para 46.
[34] 2018 PTC Judgment on a request for a ruling on jurisdiction in Myanmar/Bangladesh, para. 86.
[35] Ibid.

for an admissibility assessment at the investigation stage, would not change the fact that the Prosecutor failed to act in conformity with their obligation to request authorisation to open an investigation into the situation in Nigeria, once they had concluded that there was a reasonable basis to proceed with an investigation.

43. The Prosecutor cannot, in response to this submission, rely on new facts to justify a failure to act pursuant to article 15(3) where the statutory criteria to proceed preceded facts which were subsequent to the original failure. Such an approach would allow the Prosecutor to indefinitely delay the implementation of a statutory obligation until such time as circumstances change, possibly even due to the delay created by the Prosecutor themselves.

44. In addition, the legal framework does not provide for a situation before the Court to 'return' to the preliminary examination stage, once a conclusion has been reached that there is a reasonable basis to proceed with an investigation. As previously discussed,[36] the structure of article 15 provides for only two possible outcomes of a preliminary examination; a request for authorisation of an investigation or a conclusion that there is no reasonable basis for an investigation.

45. Moreover, the assessment of the admissibility of cases, in particular the complementarity component, is intended to continue during the investigation stage. Article 15(4) provides in this respect that "If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, *without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.*" (emphasis added) Similarly, upon the initiation of an investigation, article 18(2) allows States to request that the Prosecutor defer to their own investigations of the crimes which form the basis of the investigation. The Statute in this way makes clear that the question of the admissibility of cases on the basis of complementarity can and should continue to be assessed during the investigation stage of proceedings.[37]

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[36] See paragraph 32 of the present submission

[37] Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, paragraph 734: "The OTP appears to consider that positive complementarity is exclusive to the PE stage (based on the Strategic Plan and Policy). However, nothing precludes the OTP from engaging

c) Recognising the Prosecutor's obligation under article 15(3) to request authorisation to open an investigation, once they conclude that the statutory criteria for doing so have been met, is consistent with internationally recognised human rights, as applicable under article 21(3) of the Statute.

46. Recognising the Prosecutor's legal obligation under article 15(3) to request authorisation to open an investigation, once they conclude that the statutory criteria for doing so have been met, is consistent with the requirements of article 21(3) of the Statute. Article 21(3) requires that the "application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

47. Pre-Trial Chamber I has previously stated in this respect that, "the Appeals Chamber's statement in the context of article 21(3) of the Statute that, 'the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court'. The preliminary examination is no exception to this fundamental principle and this concerns not only its result but also its conduct. This means that the Prosecutor is mandated to respect the internationally recognized human rights of victims with regard to the conduct and result of her preliminary examination, especially the rights of victims to know the truth, to have access to justice and to request reparations, as already established in the jurisprudence of this Court."[38]

48. As noted by the Pre-Trial Chamber, victims of crimes under international law and other serious human rights violations benefit from a number of well-established rights to truth, justice and reparations.[39] The United Nations' 2005 Basic Principles and Guidelines on

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states in the same manner during the investigation stage'.

[38] 2018 PTC Judgment on a request for a ruling on jurisdiction in Myanmar/Bangladesh, paras. 87-88.

[39] Article 2(3)(1) and 14(1) of the International Covenant on Civil and Political Rights; Articles 6(1) and 13 of the European Convention on Human Rights; Article 7(1)(a) of the African Charter on Human and Peoples' Rights; Articles 8(1) and 25(1) of the American Convention on Human Rights; UNGA, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human

the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law recall that victims of such violations have a right to "(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; (c) access to relevant information concerning violations and reparation mechanisms."[40] The UN Basic Principles also state that "An adequate, effective and prompt remedy for gross violations of international human rights law or serious violations of international humanitarian law should include all available and appropriate international processes in which a person may have legal standing and should be without prejudice to any other domestic remedies."[41]

49. Accessing justice and an effective remedy within a reasonable time is central to the effective realisation of victims' rights. Human rights instruments emphasise that victims' access to justice and an effective remedy must be *prompt*, fair and effective.[42] The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa note in this respect that victims "are entitled to have access to the mechanisms of justice and to *prompt* redress" (emphasis added)[43], requiring that "unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims"[44] be avoided. Directive 2012/29/EU of the European Parliament and Council of Europe establishing minimum standards on the rights, support and protection of victims of crime similarly provides that "victims are entitled to obtain a decision on compensation […] *within a reasonable time*"[45] (emphasis added).

50. The Pre-Trial Chamber has emphasised in particular the impact of delays in initiating

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Rights Law and Serious Violations of International Humanitarian Law, 15 December 2005, VII and VIII (hereinafter referred as "2005 UN Basic Principles"). See also Pre-Trial Chamber I, *Situation in the State of Palestine*, Decision on Information and Outreach for the Victims of the Situation, ICC-01/18, 13 July 2018, para 9. (hereinafter referred to as "2018 PTC Decision on outreach for victims in Palestine")

[40] 2005 UN Basic Principles, Article 11.

[41] 2005 UN Basic Principles, Article 14.

[42] 2005 UN Basic Principles, Articles 1 and 11; UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, Article 4.

[43] African Commission on Human & Peoples' Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 29 May 2003, Section P(a). [hereinafter referred to as "ACHPR Principles and Guidelines on the Right to a Fair Trial in Africa"]

[44] ACHPR Principles and Guidelines on the Right to a Fair Trial in Africa, Section P.(f).

[45] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 16. [hereinafter referred to as "EU 2012 Directive on victims' rights"]

an investigation on victims' right to reparation, noting that "the IACtHR has established that "it is necessary to act with special promptness when, owing to the design of the domestic laws, the possibility of filing a civil action for damages depends on the criminal proceeding". Within the Court's legal framework, victims' rights both to participate in the proceedings and to claim reparations are entirely dependent on the Prosecutor starting an investigation or requesting authorization to do so. The process of reparations is intrinsically linked to criminal proceedings, as established in article 75 of the Statute, and any delay in the start of the investigation is a delay for the victims to be in a position to claim reparations for the harm suffered as a result of the commission of the crimes within the jurisdiction of this Court."[46]

51. In the context of proceedings regarding the issuance of arrest warrants under article 58, the Prosecutor has stressed that "the Court is required to respect the internationally recognised rights of victims with regard to the conduct of its proceedings, especially the rights of victims to know the truth, to have access to justice, and to request reparations. This means that the Chamber must fulfil its solemn responsibility to consider and decide on the Article 58 Applications with utmost urgency. Any unjustified delay in these proceedings detrimentally affects the rights of victims."[47]

52. A reading of article 15(3) granting discretion to the Prosecutor not to request authorisation to open an investigation despite having concluded that the statutory criteria for doing so have been met, or to indefinitely delay such a request for authorisation, would be inconsistent with rights of victims. In this case, the indefinite delay of the Prosecutor in requesting authorisation to open an investigation in Nigeria, at currently nearly four years since the completion of the preliminary examination and the announcement of their intention to request authorisation to open an investigation, is preventing the realisation of Nigerian victims' rights to obtain truth, justice and reparations.

53. At present, victims of crimes in Nigeria have limited avenues, if any, for realising these rights at the national level. The Prosecutor is aware of the obstacles facing victims in obtaining truth, justice and reparations in Nigeria; in their conclusions on the preliminary

[46] 2018 PTC Judgment on a request for a ruling on jurisdiction in Myanmar/Bangladesh, para. 88.
[47] Pre-Trial Chamber I, Prosecution's consolidated response to observations by interveners pursuant to article 68(3) of the Rome Statute and rule 103 of the Rules of Procedure and Evidence, *Situation in the State of Palestine*, 23 August 2024, ICC-01/18, para. 10.

examination the Prosecutor concluded that the Nigerian authorities were unable or unwilling to investigate and prosecute crimes under international law committed in northeast Nigeria. Through the indefinite delay in requesting authorisation to open an investigation into the situation in Nigeria, the Prosecutor is thus knowingly further contributing to the obstacles facing victims of such crimes in these victims' efforts to realise their rights to obtain truth, justice and reparations.

54. The Prosecutor should therefore act without further delay to fulfil their obligation under article 15(3) by requesting authorisation to open an investigation into the situation in Nigeria, in view of the rights of victims of war crimes and crimes against humanity in Nigeria to obtain truth, justice and reparations for the harm they have suffered.

d) Recognising the Prosecutor's obligation under article 15(3) to request authorisation to open an investigation, once they conclude that the statutory criteria for doing so have been met, is also consistent with victims' right to information about the status and progress of criminal proceedings.

55. Recognising the Prosecutor's legal obligation under article 15(3) to request authorisation to open an investigation, once they conclude that the statutory criteria for doing so have been met, is also consistent with victims' right to information about the status and progress of criminal proceedings, as applicable under article 21(3) of the Statute.

56. As a Pre-Trial Chamber held, "Victims have the right to provide information to, *receive information from* and communicate with the Court, regardless and independently from judicial proceedings, including during the preliminary examination stage."[48] (emphasis added)

57. At the preliminary examination stage, the Statute and Rules of Procedure and Evidence give effect to these rights by requiring the Prosecutor to notify victims and others who have provided information to the preliminary examination of a decision on whether to initiate investigations *proprio motu*. If the Prosecutor concludes that there is no reasonable basis for an investigation, article 15(6) and rule 49(1) require that the Prosecutor informs those who provided the information, including the reasons for their decision. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, rule

[48] 2018 PTC Decision on outreach for victims in Palestine, para 10.

50(1) requires that the Prosecutor inform victims of their intention to seek authorisation to initiate an investigation. In both possible outcomes envisaged by the Statute, victims and others who provided information to the preliminary examination have a right to be informed of the outcome of the process. As previously outlined, the situation the OTP has created since December 2020 with respect to Nigeria, in which the Prosecutor has concluded that there is a reasonable basis to proceed with an investigation but has nevertheless not requested authorisation to do so, falls outside of this legal framework.

58. Human rights standards, applicable pursuant to article 21(3) of the Statute, recognise that victims have a right to information in the context of criminal proceedings. In particular, victims' right to information about the status and progress of criminal proceedings has been recognised as an obligation arising from the right of access to justice in numerous international human rights instruments. These instruments require that victims are informed of the role, scope, timing and progress of proceedings and of the disposition of their cases, especially where serious crimes are involved.[49] Directive 2012/29/EU of the European Parliament and Council of Europe on minimum standards on the rights, support and protection of victims of crime, specifies in particular that "[w]hen providing information, sufficient detail should be given to ensure that victims are treated in a respectful manner and to enable them to make informed decisions about their participation in proceedings. In this respect, information allowing the victim to know about the current status of any proceedings is particularly important."[50]

59. A reading of article 15(3) according discretion to the Prosecutor not to request authorisation to open an investigation despite having concluded that the statutory criteria for doing so have been met, and thereby immunize themselves against obligations under the Statute and under human rights law to provide information about the outcome of the preliminary examination to victims and others who provided information, is inconsistent with article 21(3) of the Statute.

60. The Pre-Trial Chamber has previously emphasised the importance of the Court's role

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[49] UNGA, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 29 November 1985, para 6(a); ACHPR Principles and Guidelines on the Right to a Fair Trial in Africa, Section P. (f); EU 2012 Directive on victims' rights, para 26 and Article 6(2)(b).

[50] EU 2012 Directive on victims' rights, para 26.

and activities being properly understood and accessible to victims.[51] The Chamber has stressed in this respect that, in order to be able to properly exercise their rights within the Court's legal framework, victims must be provided "with sufficient and accurate information about the Court's role and activities", including at stages of proceedings prior to the opening of an investigation.[52]

61. In the situation of Colombia, the Pre-Trial Chamber recognised the importance of such information at the stage of preliminary examination. In examining whether the information provided by the Prosecutor with regards to their decision not to proceed with an investigation was sufficient, the Pre-Trial Chamber concluded that:

> "when the Prosecutor concludes after a preliminary examination that 'the information provided [to his Office] does not constitute a reasonable basis for an investigation', he is under an obligation to promptly inform those who have provided this information of such, including the reasons for his decision. In this regard, the Chamber has taken note of the Prosecutor's Press Release and of the Cooperation Agreement, as well as his further communications since. However, in the view of the Chamber, the information contained in the aforementioned documents and communications does not constitute sufficient information with respect to article 15(6) of the Statute, *particularly in light of the length of the preliminary examination and the expectations it may have raised for those who provided information prior to, or during the preliminary examination*. […]" (emphasis added).[53]

The Pre-Trial Chamber therefore urged the Prosecutor to promptly provide additional information to the relevant actors of the grounds for the decision to close the preliminary examination in Colombia.[54]

62. By contrast, during the period since the conclusion of the preliminary examination in 2020, the Prosecutor has given very little, unclear and, at times, contradictory, information

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[51] 2018 PTC Decision on outreach for victims in Palestine, para. 7.
[52] Ibid, para 11.
[53] PTC I, Decision on the 'Request for review of the Prosecutor's decision of 28 October 2021 to close the preliminary examination of the situation in Colombia' and related requests, *Situation in Colombia*, 22 July 2022, ICC-RoC46(3)-01/22-6, paras. 9-10. (hereinafter referred as "2022 PTC Decision on victims' challenge to the closing of the preliminary examination in Colombia").
[54] Ibid, para 11.

about the status of the situation of Nigeria. In this respect, it is worth recalling the nature of the publicly available information about the situation of Nigeria at the Court since 2020. In December 2020, the preliminary examination of Nigeria was concluded with a determination that the statutory criteria for requesting authorisation to open an investigation had been met, and a public statement that the next step would be to request such authorisation.[55] In its only two public statements on the situation in Nigeria since December 2020, the OTP has reaffirmed that the legal criteria to open an investigation into the situation in Nigeria had been met and has referred to the preliminary examination as having been concluded, but has also used language which casts doubt on whether and, if ever, when, the Prosecutor would request authorisation to open an investigation.[56]

63. In parallel to these press releases addressed to the general public, in its proposed budgets submitted to the Assembly of State Parties each year since then, the OTP has included Nigeria in the list of preliminary examinations of which it is "currently seized",[57] while simultaneously also noting that the preliminary examination of Nigeria has been completed.[58] Similarly, in its 2022 annual report, the OTP mentioned the conclusion of the preliminary examination of the situation in Nigeria, but nevertheless mentioned ongoing steps "that will inform any decision regarding the situation".[59] The following year, its 2023 annual report did not include any information with regards to the Nigeria situation.[60]

64. Faced with the above-mentioned limited and inconsistent public information, the Applicants have taken steps to obtain clarity from the OTP, via letters directly addressed to the Prosecutor.[61] The responses received offered no clarity on the status of the situation of

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[55] See paras 9-10 of the present submission.
[56] See paras 11 and 13 of the present submission.
[57] Assembly of States Parties, Proposed Programme Budget for 2022 of the International Criminal Court, ICC-ASP/20/10, 16 August 2021, paras, 25, 105; Assembly of States Parties, Proposed Programme Budget for 2023 of the International Criminal Court, ICC-ASP/21/10, 19 August 2022, paras. 4, 26, 172; Assembly of States Parties, Proposed Programme Budget for 2024 of the International Criminal Court, ICC-ASP/22/10, 31 July 2023, para. 29; Assembly of States Parties, Proposed Programme Budget for 2025 of the International Criminal Court, ICC-ASP/23/10, 31 July 2024, para. 38.
[58] Assembly of States Parties, Proposed Programme Budget for 2022 of the International Criminal Court, ICC-ASP/20/10, 16 August 2021, paras. 25, 105; Assembly of States Parties, Proposed Programme Budget for 2023 of the International Criminal Court, ICC-ASP/21/10, 19 August 2022, paras. 26, 172.
[59] OTP, 'Towards a more just world every day', Annual report of the Office of the Prosecutor, 1 December 2022, pages 44-45.
[60] OTP, 'Delivering better together', Annual report of the Office of the Prosecutor, December 2023.
[61] Paragraph 21 of the present submission; Confidential Annexes 1 and 2.

Nigeria, nor did the responses provide any legal or factual justification (notwithstanding the irrelevance that new facts would have on the Prosecutor's outstanding obligation to request authorisation for an investigation) for the indefinite delay in requesting the opening of the investigation.[62]

65. A total of 10 years of preliminary examination combined with the 2020 public announcement that authorisation to open an investigation would be requested have given rise to significant and legitimate expectations among victims and affected communities. Nearly four subsequent years with no tangible action on the part of the Prosecutor and very little and contradictory public information about the status of the situation is inconsistent with victims' right to information pursuant to article 21(3) of the Statute.

66. The Prosecutor should not be permitted to maintain a situation in which they are operating outside of the legal framework provided for by article 15, and thereby immunize themselves against obligations under the Statute and under human rights law to provide information to victims and others who provided information to the preliminary examination.

IV. LEGAL STANDING AND ADMISSIBILITY

67. The Applicants submit that they have legal standing to make this submission on two grounds, namely on the basis of article 68(3) of the Statute and/alternatively on the basis that, in any event, the Pre-Trial Chamber may examine this request on its own initiative.

Legal standing in virtue of article 68(3)

68. The Applicants submit that they have legal standing in virtue of article 68(3), which provides that "where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." The Pre-Trial Chamber has noted with respect to article 68(3) that "Victims have therefore the *right* to be heard and considered, at stages of the proceedings determined to be appropriate, and the

[62] Paragraph 21 of the present submission; Confidential Annex 3.

Court has the *duty* to effectively enable them to exercise this right."[63] (emphasis in the original)

69. In the present case, Amnesty International makes the present application in representation of the members of several networks which are part of the Jire Dole Networks,[64] who are direct and indirect victims within the Court's legal framework and have suffered various human rights violations or abuses by the armed group Boko Haram or the Nigerian state in northeast Nigeria, and who have a personal interest that those responsible for the alleged war crimes and crimes against humanity committed in northeast Nigeria since 2011, which gave rise to the harm they suffer, be investigated, prosecuted and judged by the Court. The delay in the Prosecutor's submission of an article 15(3) request therefore has serious consequences for victims' interests. It necessarily delays victims' participation in a full investigation, access to legal representatives paid for by the Court, participation in trials when cases open and the opportunity to request reparations for the harm they have suffered if and when an individual is convicted. The delay in requesting authorisation to open an investigation not only postpones these prospects, it also decreases the probability of victims being able to participate in trials and to receive reparations. As the conflict in Nigeria is ongoing and years pass, some victims will have been displaced, sometimes several times, some may become unreachable, while others will be deceased.

70. The Applicants further note that article 15(3) provides for the right of victims to make representations, without the need for them to show that their personal interests are affected.[65] This suggests that the drafters viewed the personal interests of victims as necessarily affected by proceedings related to article 15.

71. Having demonstrated that the personal interests of victims on whose behalf this application is submitted are affected, the Applicants also consider that this stage of the proceedings is appropriate for the Court to receive and examine their concerns and that this would not be prejudicial to or inconsistent with the rights of the accused and a fair and

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[63] 2018 PTC Decision on outreach for victims in Palestine, para. 8.

[64] See list of concerned networks para. 2 of the present submission. Consent forms are on file with Amnesty International

[65] Article 15(3), second sentence; AC, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the Democratic Republic of Congo,* 19 December 2008, ICC-01/04-556, para. 53, last sentence.

impartial trial.

72. As the Appeals Chamber has established, under article 68(3) "victims are not precluded from seeking participation in any judicial proceedings, *including proceedings affecting investigations*, provided their personal interests are affected by the issues arising for resolution" (emphasis added) and that "it is for the Pre-Trial Chambers to determine how best to rule upon applications for participation".[66] The Appeals Chamber has further confirmed that victims' right to participate in proceedings is also applicable prior to the investigation stage, noting "the jurisprudence of the Court, whereby article 68(3) of the Statute and the relevant Rules may and should be at times construed as vesting in a chamber a certain margin of discretion in determining whether, and in what modalities, victims may appropriately be allowed to play a role at certain stages of the proceedings (*including before* or during *the investigation stage*), despite the absence of an explicit provision to this effect."[67] (emphasis added) This is confirmed by the practice of the Pre-Trial Chamber, which has previously accepted the submissions of victims at the stages prior to investigation, including on the basis of article 68(3).[68]

73. In addition, the practice of the Pre-Trial Chamber indicates that, where their personal interests are affected, victims may be permitted to present their views and concerns on matters of which the Pre-Trial Chamber has not yet been seized.[69] Notably, the Pre-Trial Chamber has previously confirmed that, with respect to article 68(3), "the Chamber considers that one of the valid forms of victims' participation in the proceedings of a situation is to prompt the Chamber to consider exercising its *proprio motu* powers with respect to a specific issue affecting the victims' personal interests."[70]

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[66] AC, Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007, *Situation in the Democratic Republic of Congo,* 19 December 2008, ICC-01/04-556, paras. 56-57.
[67] AC, Decision on submissions received and order to the Registry regarding the filing of documents in the proceedings pursuant to articles 18(2) and 68(3) of the Statute, *Situation in the Islamic Republic of Afghanistan*, 8 November 2021, ICC-02/17, para. 12.
[68] See for example 2018 PTC Judgment on a request for a ruling on jurisdiction in Myanmar/Bangladesh, para. 21; 2022 PTC Decision on victims' challenge to the closing of the preliminary examination in Colombia.
[69] See for example PTC II, Decision on the "victims' request for review of Prosecution's decision to cease active investigation", *Situation in the Republic of Kenya,* 5 November 2015, ICC-01/09-159, para. 7 (hereinafter referred to as "PTC 2015 Decision on victims' request for review of decision to cease investigation in Kenya"); 2022 PTC Decision on victims' challenge to the closing of the preliminary examination in Colombia.
[70] PTC 2015 Decision on victims' request for review of decision to cease investigation in Kenya, para. 7.

74. In the present case, the Applicants submit that it is appropriate for the Pre-Trial Chamber to receive their concerns related to the legal questions arising from the Prosecutor's delayed application of article 15(3) in the situation of Nigeria.

75. Furthermore, the Applicants do not foresee any adverse impact on the integrity of the proceedings arising from the request contained in this submission. They wish to reiterate that this submission does not challenge the Prosecutor's assessment of whether the statutory criteria for opening an investigation are met. To the contrary, the Applicants support the Prosecutor's own assessment, which led to the conclusion of the preliminary examination. In general, the Applicants also acknowledge and respect the Prosecutor's discretionary power to initiate investigations. In addition, as there are no identified suspects or accused at this stage, there cannot be any prejudicial impact on them either.

In addition or alternatively, the Pre-Trial Chamber may examine this request on its own initiative

76. In addition or alternatively to being seized of the matter by the victims on the grounds outlined above, the Pre-Trial Chamber may also examine this issue on its own initiative. As mentioned above, the Pre-Trial Chamber has already established that "one of the valid forms of victims' participation in the proceedings of a situation is to prompt the Chamber to consider exercising its *proprio motu* powers with respect to a specific issue."[71]

77. The Applicants submit that the Pre-Trial Chamber may examine this request *proprio motu*, as the question raised is a matter of due process falling within the scope of the oversight role of the Pre-Trial Chamber.

78. The Pre-Trial Chambers were created in the Rome Statute system to safeguard the efficiency and the integrity of proceedings from the moment a situation comes before the Court until a case moves to the trial stage. Pre-Trial Chambers must ensure that due process and the rights of all parties and participants are respected, including that the Prosecutor exercises their *proprio motu* power in a manner consistent with the Rome Statute legal framework. Indeed, during negotiations on the Rome Statute, "sentiment grew in favour of

[71]PTC II, Decision on the "victims' request for review of Prosecution's decision to cease active investigation", *Situation in the Republic of Kenya,* 5 November 2015, ICC-01/09-159, para. 7

the establishment of a Pre-Trial Chamber to carry out those judicial functions provided for under the Statute that are exercised prior to the commencement of trial. […] with the Pre-Trial Chamber a certain degree of judicial control was introduced at the investigation stage."[72] The oversight role of the Pre-Trial Chamber over the Prosecutor's power to initiate investigations *proprio motu* was a particularly important aspect of these negotiations. For this reason, the Pre-Trial Chamber has been described as "the inherent constitutional check on the Prosecutor which some States required in order to accept a *proprio motu* power to initiate investigations."[73]

79. The Appeals Chamber has confirmed in this respect that the Pre-Trial Chamber should exercise judicial control over the Prosecutor's *decision not to investigate* when a situation is referred to them, and over the Prosecutor's *decision to investigate* when an investigation is initiated *proprio motu*.[74] The Appeals Chamber has noted, in particular, that "under the procedure set out in article 15 of the Statute, the pre-trial chamber has a role in respect of the Prosecutor's exercise of discretionary power only *if [he or she] determines that there is a basis to initiate an investigation*."[75] The present submission falls into this category since, as previously outlined, the Prosecutor has made such a determination in relation to the situation in Nigeria.[76]

80. The drafters of the Rome Statute did not foresee a situation where the Prosecutor would not diligently and promptly request authorisation from the Pre-Trial Chamber to open an investigation once they have determined that the statutory criteria for doing so have been met. In a case such as this, where the Prosecutor is operating outside of the statutory framework provided for by article 15, it is therefore for the Pre-Trial Chamber not only to ensure that the criteria are fulfilled for the opening of an investigation but also, more broadly, that the Prosecutor respects the relevant procedure.

81. In parallel, in the Prosecutor's December 2020 statements and other instances,

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[72] Triffterer/Ambos, Rome Statute of the International Criminal Court, A commentary, Third Edition, 2016, Fabricio Guariglia/Gudrun Hochmayr, pages 1422-1423.
[73] Triffterer/Ambos, Rome Statute of the International Criminal Court, A commentary, Third Edition, 2016, Morten Bergsmo/Jelena Pejic/Dan Zhu, page 729.
[74] 2020 AC Judgment against the PTC decision not to authorize an investigation in Afghanistan, paras 29 and 32 respectively.
[75] Ibid, para. 32.
[76] Prosecutor Statement 11 December 2020.

victims were publicly informed of the Prosecutor's conclusion of the preliminary examination and intention to open an investigation into the situation in Nigeria. Victims welcomed and celebrated the news[77] and this information created significant and legitimate expectation among victims and affected communities that the investigation *will be* opened, within a reasonable time, and that victims could make representations pursuant to article 15(3).

82. The Applicants wish to emphasise that their observations do not relate to questions of interests of justice or of admissibility, which the Appeals Chamber has found fall outside of the remit of the Pre-Trial Chamber's determination under article 15(4). Their observations relate solely to a procedural matter – that is, the nature of the Prosecutor's obligation under article 15(3) to submit a request to the Pre-Trial Chamber for authorisation to open an investigation, once they have determined that the statutory criteria for doing so are met.

83. The Applicants consider that the failure of the Prosecutor to seize the Pre-Trial Chamber in accordance with article 15, or under any other provision where the Prosecutor is required to do so, should not be permitted as a way of bypassing the Rome Statute provisions and preventing the Pre-Trial Chamber from exercising its oversight role. The Pre-Trial Chamber should not accept any interpretation of the Rome Statute or the Rules of Procedure and Evidence which would unduly restrict its power to protect due process and the rights of all parties and participants before the ICC at the pre-trial stage. The Pre-Trial Chamber's *raison d'être* remains to preserve the integrity of the proceedings and the Rome Statute system at the pre-trial stage.

84. In accordance with both the spirit of the creation of the Pre-Trial Chamber tasked with judicial oversight over pre-trial matters and the interpretation of that role by the Appeals Chamber, the Applicants submit that the question raised in this submission falls within the scope of the oversight role of the Pre-Trial Chamber, which it may therefore examine on its own initiative.

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[77] Live-streaming event titled 'Accountability in Nigeria: time for action', organized by Amnesty International, 17 December 2020, Minute 27, Hamsatu Allamin from Jire Dole stating "Now we have a sight of relief. We only pray and in fact we cannot wait to start seeing this investigation"; Amnesty International, "ICC: Milestone decision paves the way for full investigation intro atrocities in Nigeria", 11 December 2020

V. REQUEST

85. For the aforementioned reasons, the Applicants respectfully request the Pre-Trial Chamber to:

a. find that the Prosecutor, once they have concluded that the statutory criteria are met, has a legal obligation to request authorisation to proceed with an investigation within a reasonable time pursuant to article 15(3),
b. find that, in failing to request authorisation to open an investigation into the situation in Nigeria, the Prosecutor is acting inconsistently with their obligation under article 15(3) of the Statute,
c. based on the above findings, take any appropriate measures to remedy the situation,
d. grant legal standing to the Applicants under article 68(3) to bring this submission, or alternatively that the Pre-Trial chamber decides to examine the matter *proprio motu*.

Respectfully submitted on behalf of Applicants by Amnesty International,

Mandi Mudarikwa, Head of Strategic Litigation, Amnesty International

Dated this 2 December 2024

At London, United Kingdom